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No. 82-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE IRISH PEOPLE, INC.,

Petitioner,

—v.—

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. May a federal court, in a federal question case where Congress has not provided for nationwide service of process, nevertheless assert *in personam* jurisdiction beyond the reach authorized by Fed.R.Civ.P. 4(e) and the local long-arm statutes on which it relies?

2. Does the exercise of *in personam* jurisdiction by the United States District Court for the District of Columbia over newspapers and other purveyors of First Amendment materials situated anywhere in the United States violate the Due Process Cause or the First Amendment where the only forum-related activity relied on -- in this case, receipt in the District of a total of 50 newspaper copies mailed from New York to members of Congress -- consists of the exercise of the First Amendment right to petition the government?

3. Is minimal circulation in a forum a constitutionally adequate basis for the exercise of *in personam* jurisdiction, where the defendant has no other contacts with the forum and derives at most a *de minimis* benefit from that circulation, where the defendant has not engaged in activities to purposefully avail itself of the benefits and protections of the forum state's laws, and where the forum state has no interest in adjudicating the lawsuit?

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OPINIONS BELOW

The opinion of the Court of Appeals, reported at 684 F.2d 928 (D.C. Cir. 1982) is set forth infra at Pet.App. 1a-58a. That opinion reviewed two separate orders of the district court, one reported (see infra at Pet.App. 59a-74a), which forms the basis for this petition, and one reported at 502 F. Supp. 63. The Court of Appeals' discussion of the jurisdictional issue raised herein appears at 684 F.2d at 932 n.9 (see infra Pet.App. 6a n.9).

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1) to review a judgment of the Court of Appeals for the District of Columbia Circuit entered on July 2, 1982. A timely petition for rehearing and/or rehearing en banc was denied on September 9, 1982. Pet.App. 112a-114a.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment I:

> Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment V:

> No personal shall ... be deprived of life, liberty, or property, without due process of law ....

Rule 4(e) Fed.R.Civ.P.:

> (e) Same [Summons]: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which

> the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

The District of Columbia long-arm statute, § 13-423(a), provides, in relevant part:

> Personal Jurisdiction Based Upon Conduct. A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's - (1) transacting any business in the District of Columbia ....

STATEMENT OF THE CASE

This is a civil enforcement action brought by the Attorney General pursuant to the Foreign Agents Registration Act as amended (hereinafter "the Act" or "FARA"), 22 U.S.C. § 611 et seq., seeking an injunction to compel the defendant to register and otherwise comply with the Act. The defendant is a New York corporation whose sole business is the publication of The Irish People, a small weekly newspaper serving the Irish-American community. The Irish People is devoted to the reporting of local, national, and international events of particular interest and concern to its Irish-American readers. The newspaper is written and edited by American citizens, resident in New York, in the exercise of their right to freedom of speech and of the press. It is undisputed that they act as volunteers and

receive no compensation for their services. There is no written or oral agreement between The Irish People, Inc. or its editors and its alleged principal, the Irish Northern Aid Committee ("INAC"), a political association headquartered in New York City, and the Attorney General has never claimed otherwise.[1/]

1. The proceedings which form the basis of this petition stem from a motion to dismiss filed by the Irish People (hereafter sometimes referred to as "defendant") in 1976 under Fed.R.Civ.P. 12(b)(2)

1/ Although the only principal of which the defendant is alleged to be an agent is a domestic political association, the Irish Northern Aid Committee headquartered in New York, the Attorney General's complaint was not statutorily deficient in that respect because the statute apparently contemplates a duty to register by an agent of a principal which is itself the agent of a foreign principal, as the Irish Northern Aid Committee has been alleged to be. See 22 U.S.C. § 611(c).

and (3), denied by the district court in early 1977.[2/]

The sole paragraph in the complaint having any connection to the District of Columbia was ¶ 3, which alleged that "Defendant is the owner and publisher of a weekly newspaper, The Irish People, which is sold and distributed within the District of Columbia." Complaint ¶ 3. The Attorney General did not predicate his complaint on District of

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2/ There have been no proceedings on the merits of the Attorney General's complaint. The case reached the Court of Appeals in 1981 on appeal from a motion to dismiss on due process grounds granted by the District Court in November, 1980. Review of the issues raised by the grounds relied on by the District Court's dismissal, extensively addressed in the Court of Appeals' decision reversing that dismissal, is not sought here, since the Court of Appeals remanded on that ground for further exploratory proceedings. The jurisdictional issue raised in this petition, on the other hand, is squarely presented, and, if decided in petitioner's favor, would terminate this litigation promptly, consistent with the values jurisdictional limitations are intended to preserve.

Columbia-related activities in any other respect nor would such activity (e.g., mailing some copies of the newspaper to congressmen at the Capitol) have been a necessary or even appropriate element of a claim under FARA. Although defendant denied ¶ 3 except to the extent that the defendant admitted that a small number of copies of The Irish People were mailed to addresses within the District of Columbia, the Attorney General made no attempt to substantiate that allegation or otherwise to support the exercise of personal jurisdiction in this district.[3/] The defendant supported its jurisdictional objection by relying on an affidavit establishing inter alia that The Irish People,

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3/ Plaintiff had the burden of proving his entitlement to in personam jurisdiction. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). See generally J. Moore, Federal Practice ¶¶ 0.60[4], 8.08[1].

is a New York corporation, resident in New York; its newspaper is printed in the New York metropolitan area (Hillside, New Jersey); The Irish People did not get advertising from, or solicit advertising from, Washington, D.C.; had no reporters or employees or officers there; was not licensed to do business there; had at no time conducted business there; did not maintain a telephone there; had no bank accounts there; had no newsstand or other wholesale distribution there; at most 55 of The Irish People's weekly press run of 13,000 copies were sent to Washington, D.C., of these approximately 50 were mailed to members of Congress, 45 of which were sent without paid subscriptions; there were "a maximum of 5 individual subscribers in the District"; and that it received at most $100 from its Washington distribution out of approx-

imate annual operating expenses in excess of $73,750. Armstrong Affidavit, Pet.App. 116a-120a.

Nevertheless, without mentioning either a controlling local rule of competence authorizing in personam jurisdiction in these circumstances, or the consistent decisions excluding contacts with the federal government from consideration as "transacting business" within the meaning of the D.C. long-arm statute for First Amendment reasons, the district court denied the motion to dismiss, relying heavily on the fifty copies provided to congressmen. Pet.App. 69a. The court also rejected defendant's argument that the First Amendment precluded predicating jurisdiction on the minimal number of copies of an out-of-state publication distributed in the District of Columbia in the absence of any other forum-related contacts or forum interests.

2. On appeal the panel summarily rejected defendant's jurisdictional appeal. Like the district court, the Court of Appeals entirely failed to address the D.C. long-arm statute, the repeated holdings of both the D.C. Court of Appeals and the United States Court of Appeals of the D.C. Circuit applying an exception for government contacts for First Amendment reasons, or the other First Amendment issues comprehensively addressed in The Irish People's brief.[4/] The panel's entire discussion of the jurisdictional issue is as follows:

> 4/ Defendant also challenges the district court's January 1977 order denying its motion

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4/ Similarly the Attorney General's discussion of the jurisdictional issue in the Court of Appeals entirely failed to address, as defendant's brief had, whether the local long-arm statute governed the jurisdictional question and whether, assuming it did, jurisdiction was authorized by that statute as construed by the local courts.

> to dismiss for lack of jurisdiction. However, we agree with the district court that sufficient contacts exist for jurisdiction to be proper here. See Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

684 F.2d at 932 n.9., Pet.App. 6.

Defendant's petition for rehearing and/or rehearing en banc was summarily denied September 9, 1982.

REASONS FOR GRANTING THE WRIT

This case presents an unsettled question of recurring importance and continuing dispute concerning the scope of in personam long-arm jurisdiction of federal courts in federal question cases where Congress has not provided for nationwide service of process. Is that jurisdiction limited, as Rule 4(e) suggests, to cases where a state rule of competence authorizes long-arm juris-

diction and service of process to effectuate it? Or, as the Court of Appeals recently suggested in another case and apparently held below, may federal courts "disregard aspects of the state statute and state court interpretations of it that do not fit the federal frame of reference."?[5/]

Although theoretically the federal government could provide for nationwide service of process by federal courts in any jurisdiction, within the limits of any constraints imposed by the Fifth Amendment or other constitutional provisions, it has not done so for the cause of action in this case. The District of

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5/ See SFW v. Kaiser, 647 F.2d 200, 204 (D.C. Cir. 1981). The District of Columbia is a "state" for purposes of the Federal Rules of Civil Procedure. Id. at 204 n.8, citing Fed. R.Civ.P. 81(e).

Columbia has, of course, no reason to shape its long-arm statute to encompass lawsuits brought by the federal government for enforcement of federal statutory provisions against defendants throughout the United States who happen to have contacted the federal government in Washington, D.C. Accordingly, its long-arm statute has long been authoritatively construed to exclude contacts with the federal government, falling within the general scope of the First Amendment's freedom of press and of the right to petition the government for a redress of grievances, from consideration as "transacting business" within the meaning of its long-arm statute.[6/] By ignoring the local long-arm statute and the cases barring consideration of the very factors relied on below in the "transacting business"

6/ See infra at 32 n.22, 35 n.24.

analysis, the decisions below avoided the express limitations the District of Columbia has erected to the use of its long-arm statute, even though Rule 4(e) unambiguously mandates recourse to that long-arm statute in the circumstances of this case. Nearly all other Courts of Appeals have found that Rule 4(e) bars such an end-run,[7/] regardless of the "perplexities" of its reliance on state long-arm statutes in federal question cases such as this.[8/]

Notwithstanding the Court of Appeals' evident reliance on the district court's reasoning, which failed to measure jurisdiction by the standards of the local long-arm statute as construed by the local courts, it is possible to interpret its

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7/ See infra at 25 n.16.

8/ See SFW v. Kaiser, 647 F2d at 204, quoting Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv.L.Rev. 1121, 1124 n.6 (1966).

cryptic holding in another way, as agreeing (implicitly) that a local rule of competence is required but as disagreeing either that the local statute barred jurisdiction in these circumstances, and/or that the First Amendment right to petition the government required excluding the 50 copies provided to congressmen from consideration as transacting business. Viewed this way, the Court of Appeals held that the local long-arm statute did and constitutionally could consider the First Amendment activities in the nature of petitioning the federal government in Washington, D.C. as "transacting business" sufficient to warrant being haled into court there. But that holding squarely conflicts with repeated authoritative holdings of the D.C. Court of Appeals, and indeed, with a long string of D.C. Circuit cases dating back to 1945 which the D.C. Court of

Court of Appeals has expressly approved.[9/] Moreover, read this way, the decision drastically expands the jurisdiction of the federal courts in the nation's capital; will drastically increase the susceptibility of newspapers and non-profit, public interest and advocacy groups throughout the United States to costly suit in a distant (and presumably less-than-friendly) forum solely by reason of their exercise of the right to petition; and will thereby burden the exercise of the First Amendment right to petition the government in a way Congress has never contemplated. Cf. Stafford v.

9/ See infra at 35 n.24. Because there is no reason to believe that the local courts would seek to exercise personal jurisdiction over claims where the only business transacted consisted of First Amendment petitioning activity, assuming that they could constitutionally do so, the Court of Appeals should not have upheld jurisdiction even if it disagreed with the D.C. Court of Appeals that the government contacts exception is constitutionally compelled.

Briggs, 444 U.S. 527 (1980). A decision that the exercise of such a basic First Amendment right is equivalent to consent to be sued as the District of Columbia in a cause of action related to such petitioning activity surely merits this Court's prompt and careful attention.

Finally, the decision below conflicts with the decisions of four circuits holding that the First Amendment interest in protecting the free flow of publications must be considered in determining whether the Due Process Clause permits the exercise of jurisdiction over an out-of-state publisher, and requiring more substantial contacts than the minimal circulation in the forum which is all the plaintiff relies on here. If The Irish People is amenable to suit in the District of Columbia on the sole basis of five or even fifty-five copies, with no other forum-related contacts whatso-

ever, then nearly every newspaper in every town in the United States (and many published abroad) is amenable to suit in the nation's capital simply by reason of seeking to let the government know its opinions, and in New York or other cosmopolitan cities simply because former hometown residents create a steady, but extremely small and commercially irrelevant demand for news and opinion from afar. Although neither the First Amendment nor the Due Process Clause bars holding a publisher, like anyone else, amenable to suit where it "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws", Hanson v. Denckla, 357 U.S. 235, 253 (1958), minimal (and almost wholly unpaid) circulation in a forum without more -- in particular, without any expectation

of benefit based on its subscription payments or advertising revenues -- hardly amounts to the quantum of purposeful activity and reliance on state protection contemplated by the requirements of Due Process, especially considering the deterrent effect on First Amendment interests.

I. THE DECISION BELOW, SUSTAINING JURISDICTION IN A FEDERAL QUESTION CASE BEYOND THE LOCAL LONG-ARM LIMITS INCORPORATED BY FED. R.CIV.P. 4(e), CONFLICTS WITH UNITED STATES v. FIRST NATIONAL CITY BANK, 379 U.S. 378 (1965) AND WITH DECISIONS OF THE COURT OF APPEALS.

By its terms, Fed.R.Civ.P. 4(e), which applies "in all suits of a civil nature" in federal court,[10/] permits

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10/ Fed.R.Civ.P. 1. Rule 1 provides that the federal rules "govern the procedure" in all cases in federal courts without distinction. The Court has never held a federal rule inapplicable even in diversity cases governed by Erie
(footnote continued on following page)

permits federal courts to assert personal jurisdiction over defendants in civil cases only when authorized by "a statute of the United States or an order of court thereunder", or by "a statute or rule of court of the state in which the district court is held." Because there is no federal statute arguably governing service in this case, Rule 4(e) permits jurisdiction here only if authorized by a local long-arm statute.

But decisions of the D.C. Court of Appeals make clear that the only transaction of business from which the Attor-

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(footnote continued from preceding page) Railroad Co. v. Tompkins, 304 U.S. 64 (1938). See Walker v. Armco Steel Corp., 446 U.S. 740, 747-48 (1980). A fortiorari, it has never indicated that any of the rules applies in diversity cases but not in federal question cases. To our knowledge, the only Courts of Appeals to have so ruled are the D.C. Circuit's implicit holding in this case, and the Fifth Circuit's identical decision in Terry v. Raymond International, 658 F.2d 398 (5th Cir. 1981), discussed infra at 25 n.15.

ney General's claim in this case is asserted to arise -- the sending of 50 copies of The Irish People to members of Congress[11/] -- cannot be considered as transacting business within the meaning of § 13-423(a)(1).[12/] This is so because

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11/ Although the record establishes a small additional quantum of activity in the forum by The Irish People, Inc. -- an additional five copies regularly sent to paying subscribers -- the Attorney General has not claimed, and could not, that this case arises from that activity. See Plaintiff's Statement of Points and Authorities, reprinted in the Appendix filed in the Court of Appeals (hereafter "A.") at 36; see also Reply Brief for the Plaintiff-Appellant at 14-15 (relying solely on the fifty copies per week directed to members of Congress.)

12/ The only provision of the D.C. long-arm statute on which jurisdiction could conceivably be based is § 13-423(a)(1), which authorizes in personam jurisdiction in this case only "as to a claim for relief arising from the [defendant's] ... transacting any business in the District of Columbia." § 13-423(a)(1).

the government contacts doctrine which provides that "entry into the District of Columbia by nonresidents for the purpose of contacting federal government agencies is not a basis for the assertion of in personam jurisdiction." Environmental Research International, Inc. v. Lockwood Greene Engineers, Inc., 355 A.2d 808, 816 (D.C. Cir. 1976) (en banc) (hereafter Lockwood Greene).[13/]

13/ As the D.C. Court of Appeals explained in Lockwood Greene:

> The rationale for the "government contacts" exception to the District of Columbia's long arm statute ... finds its source in the unique character of the District as the seat of national government and in the correlative need for unfettered access to federal departments and agencies for the entire national citizenry. To permit our local courts to assert personal jurisdiction over nonresidents whose sole contact with the District consists of dealing with a federal instrumentality not only would pose a threat to free public participa-

(footnote continued on following page)

Accordingly, in personam jurisdiction was proper in this case only if, notwithstanding the failure of the local long-arm statute to authorize jurisdiction in these circumstances, the federal court has inherent power to step outside the confines of Rule 4(e) and to exercise in personam jurisdiction to the limits of the Fifth Amendment. The D.C. Circuit's recent indications in other cases and apparent holding in this case that it

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(footnote continued from preceding page)
tion in government, but also would threaten to convert the District of Columbia into a national judicial forum.

355 A.2d at 813. See also Rose v. Silver, 394 A.2d 1368, 1374 (D.C. 1978), reh. en banc denied, 398 A.2d 787 (1979) (First Amendment rationale, including right to petition, for government contacts doctrine).

believes such power exists[14] and the Fifth Circuit's recent decision to the

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14/ In SFW v. Kaiser, 647 F.2d 200, 204 (D.C. Cir. 1981), the Court observed:

> We note that in this case involving alien defendants and some federal claims, application of the local long-arm statute "produce[s] perplexities" since the statute was drafted from the point of view of the District community, not from the perspective of the nation as a whole. Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv.L.Rev. 1121, 1124 n.6 (1966). Under these circumstances, it might be appropriate for the federal courts to disregard aspects of the state statute and state court interpretations of it that do not fit the federal frame of reference. See id. at 1125 n.6. We need not take that step in this case, however ....

Here, although the D.C. Court of Appeals' government contacts decisions were brought to its attention, the D.C. Circuit wholly ignored them, predicating jurisdiction without reference to the local long-arm statute and relying on the district court opinion which had similarly ignored the existence of any local rule of competence. See infra Pet.App. 59a-69a.

same effect,[15] stand in direct conflict with the plain impact of this Court's decision in United States v. First National City Bank, 379 U.S. 365 (1965), and decisions of six Courts of Appeals which have held that there is no such power.[16]

15/ In Terry v. Raymond International, Inc., 658 F.2d 398 (5th Cir. 1981), the Fifth Circuit held that personal jurisdiction over an out-of-state defendant in a federal action based not wholly on diversity does not depend on the amenability of the defendant to suit under a state long-arm statute. The Court reached this result by relying solely on Rule 4(d)(7), which permits (in-state) service "in the manner prescribed by the law of the state in which the district court was held" and by ignoring Rule 4(e), which authorizes out-of-state service only "under the circumstances and in the manner prescribed" by a state statute. As leading commentators have long observed, the Fifth Circuit's analysis is simply wrong. See 4 Wright & Miller Federal Practice & Procedure ¶¶ 1075, 1114, 1115 (1978 ed.); 2 Moore's Federal Practice ¶¶ 4.32[1-2], 4.41-1[1] (1982 ed.)

16/ See, e.g., Marsh v. Kitchen, 480 F. 2d 1270 (2nd Cir. 1973); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (3rd Cir. 1981); Gkiafis v. S.S. Yiosnas, 342 F.2d 546 (4th Cir. 1965); (footnote continued on following page)

In United States v. First National City Bank, supra, a federal question case, this Court's decision that a bank could be enjoined from transferring assets of a non-party taxpayer was based on its determination that the taxpayer was amenable to the jurisdiction of the district court. In making that determination, the Court exclusively on Rule 4(e) and the long-arm statute of the state where the district court sat. 379 U.S. at 381-83; see also id. at 390 (Harlan, J., dissenting). That reliance, unquestioned by any member of the Court, and the failure of the Court to attempt to justify jurisdiction on a federal basis independent of the state long-arm

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(footnote continued from preceding page) Webber v. Michela, 633 F.2d 519 (8th Cir. 1980); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977); Barr v. United States, 478 F.2d 1152 (10th Cir. 1973). The other five circuits do not appear to have decided the question.

statute which would have avoided the difficult assumptions regarding New York law on which the Court was forced to rely, stand in direct conflict with the decisions below, predicating personal jurisdiction to the limits of due process regardless of the absence of a federal statute authorizing such service and of express limitations in governing state long-arm statutes.[17/]

The conflict between the decision below and the Fifth Circuit's decision in Terry, on the one hand, and First National City Bank, the decisions of six circuits, and the views of leading commentators, on the other,[18/] raises an

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17/ In Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 440-41 (1952), this Court noted that states have no obligation to extend their rules of competence to the limits of due process.

18/ See supra 25 n.15.

issue of fundamental importance. Federal courts are, axiomatically, courts of limited jurisdiction. This Court has zealously policed the jurisdictional limitations Congress imposed, declining to uphold, for example, the exercise of judicial power to add pendant parties as to whom no basis for federal jurisdiction exists. See, e.g., Moor v. County of Alameda, 411 U.S. 693 (1973). Moreover, the Court has stressed that the personal liberty protected by due process limitations on in personam jurisdiction should be infringed only after legislative -- not merely judicial -- decision to do so. See, e.g., Shaffer v. Heitner, 433 U.S. 186, 214-16 (1977). Cf. Stafford v. Briggs, 444 U.S. 522, 545 (1980) (stressing need for clear statement by Congress before Court will

exceed traditional venue requirements).[19/]

Were the theory relied on below and in the Fifth Circuit adopted, the basic two-fold requirement followed by all American jurisdictions that in personam jurisdiction be both statutorily authorized and within constitutional limits would be fundamentally altered. The only test would be one of constitutional power. Federal courts would exercise in personam jurisdiction over any defendant with "minimum contacts" with the sovereign -- i.e., with the United States;

19/ Insurance Co. of Ireland v. Companie des Bauxite de Guinea, 72 L.Ed.2d 492 (1982) is not to the contrary. Assuming that the facts were as plaintiff alleged, the legislature had authorized jurisdiction, and the facts were deemed admitted under sanctions approved by Congress through the Rules Enabling Act under a theory of "constructive waiver" or "presumption" of jurisdiction. That theory, of course, is unavailable to plaintiff here.

the only meaningful restraints on a court's power to summon a defendant in a federal question case would be the venue requirements; and a host of federal statutes expressly providing for nationwide service of process would be rendered superfluous.[20/] Certiorari should issue to review and reverse the judgment below.

II. THE DECISION BELOW, UPHOLDING JURISDICTION NOTWITHSTANDING THE FIRST AMENDMENT BASED GOVERNMENT CONTACTS EXCEPTION TO THE D.C. LONG-ARM STATUTE, CONFLICTS WITH CONTROLLING DECISIONS OF THE D.C. COURT OF APPEALS AND PRESENTS A FEDERAL QUESTION OF EXCEPTIONAL IMPORTANCE.

Because the decision below resolved the jurisdictional question so cryptically, it is impossible to be sure quite what theory it relied on. If, contrary to our submission above, the court did not rely on an inherent district court

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20/ See 2 Moore's Federal Practice ¶ 4.33 (1982 ed.)

power to exercise in personam jurisdiction in federal question cases despite the limitations of Rule 4(e), then it must have decided that the D.C. long-arm statute does, and constitutionally can, consider the 50 newspaper copies provided to congressmen as sufficient "transacting business" to satisfy both statutory and constitutional requirements. If that is the court's holding it conflicts squarely with controlling statutory decisions of the D.C. Court of Appeals, and presents a federal question bearing on the administration of justice in the federal courts in the nation's capital of exceeding importance.

A. The Conflict With The D.C. Court Of Appeals Concerning The Government Contacts Exception.

The conflict between the decision to uphold jurisdiction here based on the sole claim-related activity of

mailing 50 copies of The Irish People to congressmen at the Capitol [21] and applicable decisions of the D.C. Court of Appeals could hardly be plainer.[22] That decision represents such a departure from the obligation to follow those

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21/ As demonstrated supra at n.21 n.11, the Attorney General has made no assertion that his claim "arises from" the additional five copies sent to individual subscribers in the District. Such a claim would grotesquely expand the jurisdiction (and venue) applicable to FARA claims, giving the Attorney General a choice of any forum in the nation for any FARA claim where a newspaper or other communication had been distributed. There is, of course, no indication that Congress ever suggested a result with such potential for harrassment. Cf. Stafford v. Briggs, supra.

22/ See, e.g., Lockwood Greene, supra, 355 A.2d at 813-16; Rose v. Silver, 394 A.2d 1368 (D.C. 1978), reh. en banc denied, 398 A.2d 787 (D.C. 1979); and the federal cases cited with approval in Lockwood Greene, 355 A.2d at 813 n.9.

decisions in these circumstances as to call for this court's supervisory review. See, e.g., Thermtron Products v. Hermansdorfer, 423 U.S. 336 (1976); Hanna v. Plumer, 380 U.S. 460 (1965). This is not simply a conflict concerning a fine point of state law; instead, the D.C. Circuit has boldly ignored the local law Rule 4(e) obligates it to apply, namely the local long-arm statute with its repeatedly affirmed government contacts exception. Moreover, it has done so because of that court's apparent disagreement with the policy behind the doctrine, that permitting "our local courts to assert personal jurisdiction over nonresidents whose sole contact with the District consists of dealing with a federal instrumentality ... would threaten to convert the District of Columbia into a national

forum."[23/] Cf. De James v. Magnificance Carriers, Inc., 654 F.2d at 284 (noting incongruity of limiting in personam jurisdiction in admiralty case to Fourteenth Amendment due process constraints applicable to forum state's long-arm statute, but observing that Congress is free to rectify the anomaly by authorization for nationwide service of process). There should be no confusion concerning the duty of the federal courts strictly to apply established local long-arm law in cases where Rule 4(e) adopts that law. This case presents the Court with appropriate occasion for reaffirming that duty.

23/ Lockwood Greene, 355 A.2d at 813. The D.C. Circuit's opposition to that policy is particularly inappropriate here, since Congress has not designated the federal courts in Washington, D.C. as an exclusive or always-permissible forum for FARA actions, a course it is perfectly capable of following where it sees the need to do so. See, e.g., 47 U.S.C. §§ 402, 504; 42 U.S.C. § 1973c; 28 U.S.C. 2343.

B. The Conflict With The D.C. Court Of Appeals Concerning Whether The Government Contacts Doctrine Is Constitutionally Compelled By The First Amendment.

The judgment below necessarily (albeit implicitly) held that the government contacts doctrine is not required by the First Amendment. That holding stands in sharp conflict with the D.C. Court of Appeals' decisions that the government contacts exception is constitutionally required to avert "a threat to free public participation in government." Lockwood Greene, 355 A.2d at 813; see also id. at n.11.[24/]

24/ As the Court subsequently explained in Rose v. Silver, 394 A.2d 1368, 1374 (D.C. 1978) (contact with FDA), the exception is necessary to "protec[t] one's right to petition the government for a redress of grievances, without fear of the threat of suit if their contacts were limited to asserting that constitutional right." For cases applying the doctrine, see, e.g., Lockwood Greene, supra (entering the District to confer with the EPA); Mueller Brass Co. v. Alexander Milburn

(footnote continued on following page)

Like the First Amendment-based newsgathering exception to the local jurisdictional statutes from which the government contacts exception has grown,[25] the government contacts doctrine prevents those who maintain contacts in

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(footnote continued from preceding page) Co., 152 F.2d 142, 143 (1945) ("gathering information from Government departments and agencies"); Traher v. De Havilland Aircraft of Canada, Ltd., 294 F.2d 229 (1961), cert. denied, 368 U.S. 954 (1962) (contact with government and armed forces); Fandel v. Arabian American Oil Co., 345 F.2d 87 (D.C. Cir. 1965) (contact with State Department); Margoles v. Johns, 483 F.2d 1212 (D.C. Cir. 1973) (maintenance of reporters in district for newsgathering); Siam Kraft Paper Co., Ltd. v. Parson & Whittemore, Inc., 400 F. Supp. 810 (D.D.C. 1975) (taking advantage of services offered to foreign investors by government agencies), aff'd mem., 521 F.2d 324 (D.C. Cir. 1975). Each of these cases has been cited with approval by the District of Columbia Court of Appeals. See Lockwood Greene, 355 A.2d at 813 n.9.

25/ See Mueller Brass Co. v. Alexander Milburn Co., supra, 152 F.2d at 143-44.

the District solely for First Amendment reasons and who transact no other business here from consenting ipso facto to being sued here. It is based

> in the unique character of the District as the seat of national government and in the correlative need for unfettered access to federal departments and agencies for the entire national citizenry.

Lockwood Greene, 355 A.2d at 813.

Resolution of the conflict between that principle and the judgment below is vital because leaving the judgment below intact will severely impact First Amendment rights and interests of citizens seeking to give advice to the government, or to receive information or to seek relief from it. This Court has recently canvassed the burdens of forcing litigants to defend civil lawsuits "in distant districts", Stafford v. Briggs, supra, holding that Congress should not be held to have done so

without a clear statement of such intent. The burdens found significant in Stafford, however, where the government had undertaken to represent former-official defendants in lawsuits based on their actions while in office, pale in comparison with those the judgment below will place on all those, including newspapers, non-profit associations of diverse sorts, and even states, whose sole presence here consists of speaking with the federal government and who will be forced to engage and pay for D.C. counsel (often at rates far exceeding rates in distant localities) to defend lawsuits brought here under the D.C. Circuit's insupportable decision. Moreover, the jurisdiction of the federal courts would drastically expand: any contact with Congress, a federal agency, or the Executive branch will henceforth subject a distant citizen to civil suit

here on a related claim, despite congressional refusal to designate the District of Columbia as available forum in all civil cases involving the federal government's Washington, D.C. operations. Such a result is wholly inconsistent with Congress' decision to permit such groups to sue the government for review of governmental actions in their own places of residence, and to free them from having to bring suits in Washington, D.C. Stafford v. Briggs, supra. Congress would hardly have waived sovereign immunity to be sued in distant locales on grounds of fairness to private plaintiffs, while requiring citizens to shoulder the burden of defending at the government's convenience in Washington, D.C. every action in which their contacts with the government at the nation's capital, no matter how minimal, are involved. Moreover,

with particular respect to FARA actions, the decision below permits the government to oppress any person alleged to be a foreign agent who has influenced (or attempted to influence) the government in Washington, D.C. by suing him or her here, regardless of the burden of such distant suit or congressional failure to designate the District of Columbia as an exclusive or available forum in all FARA cases.

This Court has frequently recognized that the First Amendment right to petition every branch of the government is entitled to the most rigorous protection from undue governmental restrictions, and that this right in particular "needs breathing space to survive." NAACP v. Button, 371 U.S. 415, 433 (1963); see also Eastern Railroad Presidents Conference v. Noerr Motor Freight, 305 U.S. 127, 137

(1961); United Mine Workers v. Illinois State Bar Association, 389 U.S. 217, 222 (1967). Although Noerr Motor's holding that petitioning activity cannot be the basis for antitrust liability regardless of intent was cast in statutory terms, it was strongly influenced by constitutional doctrine, and both this Court[26/] and other courts[27/] have derived from it a broad principle that civil liability can never constitutionally be predicated on petitioning activity, regardless of intent.

Even if the compelling interest

26/ United Mine Workers of America v. Pennington, 381 U.S. 657, 679 (1965); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

27/ See, e.g., Missouri v. National Organization for Women, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980); Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978), cert. denied 444 U.S. 924 (1979).

test were applicable here, rather than the "no liability" principle based on Noerr, there is simply nothing resembling a compelling reason for this defendant (or others whose sole contact with the District is activity protected by the right to petition) to defend federal statutory cases in every district where they exercised First Amendment rights concerning the statute.

If the right to petition is viewed not as an independent reason not to permit jurisdiction under these circumstances but rather as one of the considerations of reasonableness and fairness which are subsumed under the due process analysis, the result is the same. There is no sense in whch The Irish People, or anyone else whose sole contact consists of contacting the federal government, has availed itself of the benefits and protections of the local

forum's laws. The point is seen most clearly by the facts here, since The Irish People could as easily have sent the copies to the congressmen at their district offices rather than in the Capitol. That The Irish People, Inc. or any other entity engaging in petitioning communications happen to have sent their publications to one address rather than another does not create an interest in either local forum -- Washington, D.C. or a congressman's home district -- in adjudicating a statutory obligation such as arises in this case. Cf. Kulko v. Superior Court, 436 U.S. 84 (1978) (letter sent to forum state insufficient basis for jursidiction where no other contacts or forum interests present).

In short, whether it is viewed as a right stemming directly from the First Amendment or as a part of due

process analysis informed, as circumstances require, by First Amendment considerations, see, e.g., Zurcher v. Stanford Daily, 436 U.S. 537 (1978); Roaden v. Kentucky, 413 U.S. 496, 504 (1973), the government contacts doctrine is constitutionally required to avoid undue burdens on First Amendment rights. The Court of Appeals' judgment, which ignores these considerations, should be reviewed and reversed.

III. THE DECISION BELOW, BASING JURISDICTION SOLELY ON MINIMAL CIRCULATION IN THE FORUM, CONFLICTS WITH DECISIONS OF FOUR CIRCUITS PRECLUDING SUCH JURISDICTION ON FIRST AMENDMENT GROUNDS.

The decision below also conflicts with decisions of four circuits holding that the First Amendment interest in protecting the free flow of publications must be considered in determining whether the Fourteenth Amendment permits the ex-

ercise of personal jurisdiction over an out-of-state publisher, and requiring more than the minimal circulation in the forum which is all plaintiff relies on here.[28/] If The Irish People is amenable to this FARA action by the Attorney

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28/ See Keeton v. Hustler Magazine, Inc., 682 F.2d 33 (1st Cir. 1982); Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967); New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966); Cox Enterprises v. Holt, 678 F.2d 936 (11th Cir. 1982). See also McCabe v. Kevin Jenkins and Associates, 531 F. Supp. 648 (E.D. Pa. 1982). Without express mention of the doctrine, the D.C. Circuit had previously affirmed a lower court decision applying it. Margoles v. Johns, 333 F. Supp. 942, 946 (D.D.C. 1971), aff'd., 483 F.2d 1212 (D.C. Cir. 1973).

Although the Second Circuit in Buckley approved the doctrine, it held, on the facts of that case, that jurisdiction over the New York Post in Connecticut was permissible. See also Arrowsmith v. United Press International, 320 F.2d 219 (2d Cir. 1963).

General solely by reasons of five or even fifty-five copies distributed in this district, then nearly any publisher who distributes a publication here even on an extremely limited basis, and every organization which sends books, leaflets or other publications to members of Congress or officials in the Executive branch in limited numbers in the District, can be haled into the District of Columbia on nearly any cause of action related to such publications. Moreover, the same First Amendment problem exists with the wide range of newspapers and other publications from literally thousands of communities and organizations throughout the nation (and indeed, well beyond) which are sent in extremely limited numbers to distant forums without expectation of substantial commercial gain, merely because of the cosmopolitan nature of the populace,

or the nature of the work they engage in. In our judgment, it is inconceivable that the First Amendment, or this Court, would have permitted the government to choose to assert in personam jurisdiction in The Pentagon Papers cases in any community in the United States where 55 copies of the New York Times, the Washington Post or the Boston Globe were distributed; or that the Sacramento Bee or Le Monde are amenable to suit in New York merely because a few dozen former residents of California or Paris residing in New York receive those papers there.

If in personam jurisdiction is held constitutionally present in this case, the burden on and consequent risk of chill to the widest possible dissemination of information would be severe. See generally New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966).

Where, as here, a newspaper or other purveyor of First Amendment material is not shown to have made any "effort to exploit or penetrate the state market beyond making the paper available to a few readers in the state who may have an interest in it", Holt, supra, 678 F.2d at 939, or to have either solicited advertising or sought to profit from its national advertisers by maximizing circulation generally,[29/] and has no other contacts with the forum,

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29/ In Curtis Publishing Co. v. Golino, 393 F.2d 586 (5th Cir. 1967) the Fifth Circuit upheld jurisdiction on this ground. The district court below erroneously attempted to analogize the facts of this case to Golino (Pet. App. 66a-68a) but Golino is inapposite. Unlike the national magazine at issue there, The Irish People has no incentive based on the nature of its advertisers or its financial arrangements with them to increase its share of or exploit the District of Columbia market and has not in fact attempted to do so.

First Amendment interests have been found by four circuits, and should be held by this Court, to preclude the exercise of *in personam* jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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